ORGANIZATION FOR INTERNATIONAL INVESTMENT
INTERNATIONAL BUSINESS INVESTING IN AMERICA

VIA E-MAIL
& FIRST CLASS MAIL

September 13, 2002

Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RE: Notice 2002-14

Dear Ms. Dinh:

These comments are submitted on behalf of the Organization for International Investment ("OFII"). OFII is a Washington, D.C.-based association representing approximately 100 United States companies (including some of the nation's largest firms) that are subsidiaries of companies based abroad. OFII has a mandate to educate the public and policy makers about the positive role U.S. subsidiaries play in the American economy, and to ensure that U.S. subsidiaries are not discriminated against in state or federal law.

I. Introduction

These comments address the Federal Election Commission's Notice of Proposed Rulemaking published at 67 Fed. Reg. 54366 (August 22, 2002), containing draft regulations to implement certain sections of the Bipartisan Campaign Reform Act of 2002 (BCRA) relating to "Contribution Limitations and Prohibitions." Specifically, these comments respond to portions of those rules concerning "whether 'indirectly' should cover a foreign controlled U.S. corporation, including a U.S. subsidiary of a foreign corporation, when such corporation seeks to make (1) non-federal donations of corporate treasury funds, or (2) federal contributions through a political action committee." As explained in more detail below, both BCRA's plain language and the legislative history indicate no intention by Congress to treat U.S. subsidiaries, their PACs, and their citizen-employees differently than other U.S. companies, PACs, and employees. Moreover, such

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proposals have repeatedly been rejected in the past by both Congress and the FEC on public policy and constitutional law grounds, and there is no reason for the FEC to reconsider these judgments now.

II. Basic Facts about U.S. Subsidiaries

U.S. subsidiaries are American companies in every sense. In 2000, the most recent year with complete data, U.S. subsidiaries:

- employed six million workers in the United States (about 5.3 percent of the entire private-sector work force);
- increased their share of U.S. Gross Domestic Product to a record high of 6.4%;
- invested heavily in their U.S. operations, spending $136.3 billion in new plant and equipment;
- reinvested $17.1 billion of their U.S. earnings back into their American operations, representing 35 percent of their total U.S. Earnings;
- paid a record $23.9 billion in federal taxes; and
- exported a record $151 billion of goods and services, accounting for almost 22 percent of all U.S. exports.

Studies also show that U.S. subsidiaries produce new high-quality jobs at a faster rate and pay substantially higher wages on average than comparable U.S.-owned companies, are responsible for an overwhelmingly large inflow of technology from their foreign parents and, through increased competition, have helped bring American consumers lower prices and higher quality products. These significant contributions to the U.S. economy are a direct consequence of the U.S.'s open investment environment, including the opportunity afforded to these companies and the Americans they employ to participate in the U.S. political process on a level playing field.

As substantial businesses within the U.S. economy, U.S. subsidiaries, both on their own and through OFII, frequently express their views on regulatory or legislative issues. Likewise, the U.S. executives and employees of these companies have much to contribute to the political debate, especially on issues of international trade, tax and corporate law. These same executives and employees typically consider their companies to be American and resent suggestions to the contrary. A list of OFII member companies, including some of the country's best known corporations, is enclosed as Attachment A.

III. Legal Background

A. Federal Election Campaign Act

The Federal Election Campaign Act, as amended, and current FEC regulations prohibit a foreign national from making a contribution, directly or through any other person, or an expenditure in connection with an election to any political office. In addition, it is unlawful to solicit, accept, or receive a contribution from a foreign national. 2 U.S.C. §441e(a); 11 C.F.R. §§ 110.4(a)(1) and (2). As defined in the Act, the term "person" includes a corporation. 2 U.S.C. §431(11). Unlike most of the other provisions of the Act, section 441e applies to any election for any political office, including state and local offices.

The term "foreign national" includes a "foreign principal" as defined by 22 U.S.C. §611(b), but does not include any citizen of the United States. 2 U.S.C. §441e(b)(1); 11 C.F.R. §§ 110.4(a)(4)(i) and (iii). Section 611(b) defines a "foreign principal" as including:

> (1) a government of a foreign country and a foreign political party;
>
> (2) a person outside of the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and
>
> (3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

The term "foreign national" also includes an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence in the U.S. as defined by 8 U.S.C. § 1101(a)(20). 2 U.S.C. §441e(b)(2); 11 C.F.R. § 110.4(a)(4)(ii).

Under 22 U.S.C. §611(b), a corporation organized under the laws of any State within the United States, with its principal place of business within the United States, is not a foreign principal. Accordingly, such an entity would not be a foreign national under 2 U.S.C. §441e. The Commission has already applied section 441e to bar foreign national entities from establishing or administering

political committees. Advisory Opinion 1977-53; *see also* 2 U.S.C. §§431(7) and 441b(b)(2)(C); 11 C.F.R. 100.6 and 114.1(a)(2)(iii).[1]

Under 2 U.S.C. §441e, a foreign national who is a shareholder, or an executive or administrative employee of a U.S. subsidiary, or a family member of such a person, may not make contributions to the subsidiary's PAC nor be solicited for such contributions. However, the Commission has made clear that those individuals in the restricted class who are employed by foreign national corporations, but who are not foreign nationals, may be solicited for contributions to the SSF of a domestic parent. *E.g.*, FEC Advisory Op. 1999-28, FEC Advisory Op. 1992-7, and FEC Advisory Op. 1982-34.

B. Bipartisan Campaign Reform Act

Section 303 of BCRA, titled "Strengthening Foreign Money Ban" states:

> Section 319 of the Federal Election Campaign Act of 1971 (2 U.S.C. 441e) is amended—
>
> (1) by striking the heading and inserting the following: "contributions and donations by foreign nationals"; and
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> (2) by striking subsection (a) and inserting the following:
>
> "(a) Prohibition.—It shall be unlawful for—
>
> "(1) a foreign national, directly or indirectly, to make—"(A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election; "(B) a contribution or donation to a committee of a

[1] In this regard, Commission regulations state:

> A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, labor organization, or political committee, with regard to such person's Federal or nonfederal election-related activities, such as decisions concerning the making of contributions or expenditures in connection with elections for any local, State, or Federal office or decisions concerning the administration of a political committee.

11 C.F.R. § 110.4(a)(3); *see* FEC Advisory Opinions 1995-15 and 1990-8 for an application of these restrictions.

political party; or "(C) an expenditure, independent expenditure, or disbursement for an electioneering communication (within the meaning of section 304(f)(3)); or

"(2) a person to solicit, accept, or receive a contribution or donation described in subparagraph (A) or (B) of paragraph (1) from a foreign national."

IV. Discussion

A. Congress Has Not Required the FEC to Alter Its Current Regulations Regarding U.S. Subsidiaries

As reproduced above, the plain language of BCRA makes no mention of U.S. subsidiaries. Likewise, we could find no mention of U.S. subsidiaries in the legislative history regarding this provision. Senator Feingold's section-by-section description of BCRA states only the following:

> Sec. 303. Strengthening Foreign Money Ban. Prohibits foreign nationals from making any contribution to a committee of a political party or any contribution in connection with federal, state or local elections, including any electioneering communications. This clarifies that the ban on contributions to foreign nationals applies to soft money donations.

Cong. Rec. S1994 (March 18, 2002).

When BCRA was being considered by the House of Representatives, an amendment was offered to restrict contributions solely to U.S. citizens and nationals. This amendment engendered heated debate and was defeated by a vote of 268-160. Cong. Record H448-451 (February 13,2002). At no time during the lengthy discussion on the House floor did anyone suggest the legislation would diminish the ability of U.S. corporations and their PACs to participate in the U.S. political system.

We note that the draft Notice of Proposed Rulemaking, as presented to the Commission by the Office of General Counsel, stated that "BCRA does not mandate a rule-making regarding U.S. subsidiaries." Agenda Document 02-57 at 31. We believe that was the correct conclusion, and that the inclusion of the issue of political activity by U.S. subsidiaries and U.S. residents and citizens in the Notice was both unnecessary and ill-advised.

On several occasions in the recent past, Congress and the Commission have reviewed this issue. In 1998, for example, Representative Marcy Kaptur (D-OH) introduced a bill that would have prohibited U.S. citizen employees from

participating in PACs. To counter her amendment, Representatives Paul Gillmor (R-OH) and John Tanner (D-TN) introduced an amendment to protect U.S. subsidiaries from such discriminatory treatment. On June 19, 1998, the House overwhelming passed the Gillmor/Tanner amendment by a vote of 395 "yes" to zero "no." Floor debate leading up to the vote, indicated strong support for the rights of the employees of U.S. subsidiaries to contribute to PACs.[2]

Congress therefore knows how to raise this issue and from recent history is not oblivious to it. Great deference should therefore be afforded to the fact that

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[2] Representative Gillmor stated:

> [T]he amendment which the gentleman from Tennessee (Mr. Tanner) and I are offering would reaffirm in law a vital national interest, namely, that all Americans eligible to vote be treated in the same way by the Federal Election Campaign Act. The Gillmor-Tanner amendment is necessary because proposals have been made, both in this body and at the FEC, which would treat nearly five million Americans as second-class citizens politically. Namely, such proposals would deny American citizens who work for American subsidiaries of companies which are headquartered abroad an avenue of political association and participation that is guaranteed all other Americans, namely, the right to voluntarily contribute money to political candidates through political action committees sponsored by their employers.
>
> Mr. Chairman, in my home State of Ohio, more than 218,000 Ohioans are employed by American subsidiaries of companies headquartered abroad, and there are more than 5 million Americans nationwide. That number is growing daily. It will get larger still as soon as the merger between Chrysler and Daimler-Benz is completed to form a new Daimler-Chrysler corporation.
>
> It makes no sense to tell these Americans that today they may contribute to their company's political action committee, but the day the merger is completed they instantly become second class citizens and are denied this avenue of political participation. Even though the name on the paycheck may change, these employees remain American citizens, and the vagaries of corporate mergers should not be permitted to deny them their rights as Americans.

Cong. Rec. H4863 (Oct. 28, 1997). The provision eventually died along with the rest of campaign finance reform bills that year, but a very positive precedent was set on this issue for U.S. subsidiaries.

Congress had the opportunity to insert further restrictions on U.S. subsidiaries, but did not. Therefore, no principled rationale exists for the Commission to now exceed its statutory mandate and rulemaking authority by implementing a regulation that would deny American citizens who are employed by American companies the right to make non-federal donations out of corporate treasury funds derived from U.S. business activities, or contribute to, be solicited by, or make contributions from affiliated PACs.

At every such moment, Congress and the Commission have concluded that current law and regulations adequately insulate U.S. subsidiaries, their PACs, and their employees from foreign influence.[3] In particular, FEC rules already expressly prohibit (a) any financing of PAC activities by a foreign parent, (b) PAC contributions from foreign nationals, and (c) any participation by foreign nationals, including the foreign parent, in the formation, operation or administration of the PAC or in decisions regarding PAC contributions. Accordingly, Congress and the Commission have consistently refused to discriminate against these U.S. citizens and companies from fully participating in the political process.

B. Discriminatory Restrictions Are Constitutionally Indefensible

Any action to discriminate in this area impairs the Constitutional rights of the American citizen-employees of foreign-owned U.S. companies. The First Amendment protects the speech and associational rights of all United States citizens, whether they are employed by domestic or foreign companies. The Supreme Court stated in *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." The Court stated further that such discussions and debates, especially those surrounding controversial issues, are "undeniably enhanced by group association." *Id.* at 15. Therefore, declared the Court, "[t]he First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id.* at 14.

Buckley went on to address the nexus between speech and associational rights and political contributions. The Court noted that "expensive modes of communication [have become] indispensable instruments of effective political speech," and that such modes require "the expenditure of money." *Id.* at 19. Consequently, contribution limitations "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Id.* Moreover, the Court found contribution restrictions to infringe upon a "contributor's freedom of political association" by limiting that person's ability to both affiliate with a particular candidate and to pool his or her resources with

[3] These protections have worked well and, as the FEC concluded in 1991 and 1999 rulemakings reviews of this issue, do not need to be strengthened.

"like-minded persons . . . in furtherance of common political goals." *Id.* at 24, 22. Thus, concluded the Court, "governmental actions which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 25.

The Commission has consistently honored the First Amendment rights of American citizens who work for international companies. For example, the Commission has ruled that "[i]t is not unlawful . . . for a United States citizen who is employed outside the United States, as an executive of a foreign national corporation subsidiary, to make contributions to the separate segregated fund of the United States parent corporation." FEC Advisory Op. 1982-34 (citing FEC Advisory Op. 1979-59). Similarly, the Commission has upheld the right of a domestic parent corporation to solicit contributions from the eligible members of the restricted class of its international franchisees. FEC Advisory Op. 1992-7.

The Commission has approved numerous Advisory Opinions allowing U.S. corporations that are subsidiaries of companies based abroad to establish separate segregated funds ("SSFs"), provided that no foreign national is solicited for the fund or involved in the fund's decision-making process. See FEC Advisory Op. 1999-28; FEC Advisory Op. 1995-15; FEC Advisory Op. 1990-8; see also FEC Advisory Op. 1989-29; FEC Advisory Op. 1980-100; FEC Advisory Op. 1978-21. Additionally, the Commission has a regulation specifying restrictions on participation by foreign nationals in SSFs. *See* 11 C.F.R. § 110.4(a)(2). Finally, as noted above, U.S. subsidiaries are already subject to Commission rules devised to prohibit foreign nationals from making political contributions. 11 C.F.R. § 110.4.

C. Discriminatory Treatment Of American Citizens Should Be Rejected On Public Policy Grounds

The premise on which all discriminatory campaign finance proposals are based – that U.S. subsidiaries are foreign rather than American – is fundamentally flawed. U.S. subsidiaries are American companies in every sense of the word, especially in the contribution they make to the U.S. economy and their local communities. More importantly, their workers are American citizens, voters, and taxpayers. Their political involvement, including contributions, must remain on equal footing with the employees of other American companies and their employees. The FEC must refrain from taking any actions that would imply that U.S. subsidiaries and their American employees are somehow second-class citizens.

Beyond fairness, new U.S. subsidiary restrictions would also be unworkable. Most previous proposals have relied on an arbitrary percentage of ownership in which companies exceeding the percentage would be determined to be "foreign." In today's global financial market, such tests of ownership are unworkable because shares in companies are traded around the world. Ownership of the majority of shares ebbs and flows with the market. On any given day, a blue chip "American" company may have a majority of its shares owned outside the United

States. Is it then "foreign"? Conversely, how are companies to be treated that have foreign headquarters, but majority U.S. ownership?

D. The Adoption Of Discriminatory Regulations Toward U.S. Subsidiaries Would Cause The United States To Derogate From Its Obligation To Accord "National Treatment" To Many U.S. Companies

As a matter of international law, according unequal treatment to U.S. subsidiaries of foreign corporations would be inconsistent with U.S. obligations in the North American Free Trade Agreement, bilateral investment treaties, various friendship, commerce, and navigation treaties to provide non-discriminatory treatment to U.S. subsidiaries. Even if there were no violations of international agreements, discriminatory treatment to these U.S. companies is wholly inconsistent with long-standing U.S. investment policy of welcoming international investment in the United States.

IV. Conclusion

Thank you in advance for your consideration of these comments. OFII looks forward to working with the Commission during the course of this rulemaking. In addition, OFII respectfully requests that the Commission hold hearings on the "Contribution Limitations and Prohibitions" NPRM and that its representatives be afforded the opportunity to testify on its behalf during those hearings, tentatively scheduled for October 3, 2002.

Sincerely,

Todd M. Malan
Executive Director

Enclosures